

2014 WL 8104532 (Kan.Dist.Ct.) (Trial Motion, Memorandum and Affidavit)

District Court of Kansas.
Eighteenth Judicial District
Civil Department
Sedgwick County

Carol L. BELT, as the Guardian and Conservator of Morley E. Fackler, Plaintiff,

v.

Jennie O. POON, Defendant.

No. 2014CV000408.

August 13, 2014.

Defendant's Objection to: Plaintiff's Motion for Summary Judgment

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Defendant JENNIE O. PONN, through her lawyer Derek S. Casey of TRIPLETT, WOOLF & GARRETSON, LLC, objects to plaintiff CAROL L. BELT'S motion for summary judgment.

I. INTRODUCTION.

Carol Belt filed this lawsuit to rescind two gifts Morley Fackler gave to Jennie Poon. Ms. Belt is Mr. Fackler's only child and the sole heir to his estate - which she acknowledges is worth more than \$1,000,000.00. Ms. Poon has been involved with Mr. Fackler in an exclusive and romantic relationship for many years.

In June of 2013, Mr. Fackler and Ms. Poon created a joint tenancy bank account at Meritrust Credit Union. The written contract clearly stated that the bank account was a joint tenancy account with rights of survivorship. Mr. Fackler initially deposited \$150,000.00 into this account. Several weeks later, he deposited another \$250,000.00 into the same account. Meritrust Credit Union sent Mr. Fackler monthly statements showing the account balance and identifying the account as a joint account owned by himself and Ms. Poon.

In October of 2013, Mr. Fackler's health began to fail. He was eventually hospitalized for several weeks. Ms. Belt, a telemarketer from California, came to Wichita at Ms. Poon's request to assist with Mr. Fackler. After her arrival, Ms. Belt demanded that her father sign a power of attorney. Mr. Fackler initially declined. Ms. Poon, witnessing this and other events, began to distrust Ms. Belt's motives. Ms. Poon withdrew \$150,000.00 plus interest from her joint account with Mr. Fackler and deposited it into her account to protect the funds from Ms. Belt. Ms. Poon's instincts were correct; when Ms. Belt finally compelled her father to sign a power of attorney, Ms. Belt closed the account at Meritrust Credit Union and, according to verified documents she has filed with this court, secreted the money.

Mr. Fackler was released from the hospital and rehabilitation in December 2013. He and Ms. Poon went to the Bank of America on Christmas Eve 2013 and met with Sharon Coupland. Ms. Coupland is an Assistant Vice President at Bank of America and trained in **elder abuse** issues. Mr. Fackler told Ms. Coupland that he wanted to give Ms. Poon \$117,000.00 representing one-third of a disbursement from one of his investment accounts. Ms. Coupland, based on her training, quizzed Mr. Fackler to confirm that he wanted to make this gift to Ms. Poon. Mr. Fackler, on his own, confirmed that he wanted to make this gift. Mr. Fackler also told Ms. Coupland that he wanted to rescind the power of attorney held by Ms. Belt. Ms. Coupland contacted

Bank of America's legal department for direction on this request. With their advice, Ms. Coupland issued the cashier's check for \$117,000.00 to Ms. Poon and rescinded Ms. Belt's power of attorney.

Apparently, Ms. Belt was infuriated when she learned of this conveyance. Ms. Belt filed a petition to establish a guardianship and conservatorship over her father. Although Ms. Belt knew that Ms. Poon was an important person in her father's life, she declined to inform Ms. Poon about the petition. Instead, in the proposed order to appoint her as guardian and conservator, Ms. Belt inserted language indicating that the court was requiring her to keep Ms. Poon from seeing her father. Ms. Belt obtained this order by disclosing her father's gifts to Ms. Poon and misrepresenting her father's estate to create unwarranted suspicion as to the gifts.

Ms. Belt then filed this lawsuit to rescind the gifts. Initially, Ms. Belt obtained a Friday afternoon restraining order preventing Ms. Poon from seeing Mr. Fackler. Nonetheless, Mr. Fackler continued to reach out to Ms. Poon to tell her that he loved her, missed her, and wanted to see her. Ms. Poon challenged the restraining order and this court rescinded it. Ms. Belt, however, continues to deny the relationship between Ms. Poon and Mr. Fackler.

Ms. Belt contends that Mr. Fackler and Ms. Poon had a side agreement on the joint tenancy bank account. It is her contention, based upon her father's affidavit, that Ms. Poon was to deposit an additional \$150,000.00 before the account was truly a joint tenancy account. This evidence, which is questionable coming from a source that Ms. Belt also argues is mentally incapacitated, is inadmissible parol evidence. The parol evidence rule specifically applies to joint tenancy bank account contracts to prohibit any evidence of a contemporaneous oral agreement offered to vary the unambiguous terms of the contract. The bank account contract is clear in its statement that it is a joint tenancy account with rights of survivorship. As such, Ms. Belt lacks admissible evidence to sustain her breach of contract claim. Therefore, the court must deny her motion and grant partial summary judgment on this contention to Ms. Poon.

Ms. Belt's second contention is that Mr. Fackler lacked mental capacity to give Ms. Poon \$117,000.00 on Christmas Eve. The parties have deposed Ms. Coupland and confirmed that she concluded that Mr. Fackler had the requisite capacity and intent to make the gift to Ms. Poon. Ms. Poon does acknowledge that there is a question of fact as to Mr. Fackler's mental capacity since his diagnosis of progressive senile dementia in November 2013. Under these circumstances, a trial is required to determine this disputed issue of material fact. For this reason, the court should deny Ms. Belt's motion for summary judgment on the second contention.

II. MS. POON'S RESPONSE TO MS. BELT'S STATEMENT OF FACTS.

1. Uncontroverted.

2. Uncontroverted. Ms. Poon's opinions regarding Mr. Fackler's mental capacity are admissible. *See In re: Estate of Roberts*, 192 Kan. 91, Syl. ¶ 2, 386 P.2d 301 (1963) (non-expert testimony admissible on the question of mental capacity).

3. Controverted in part. The parties stipulated that Mr. Fackler and Ms. Poon opened a joint bank account at Meritrust Credit Union on June 15, 2013. Pretrial Order at 5, ¶ 4(c), (d). Ms. Poon controverts Ms. Belt's assertion that Mr. Fackler "opened an account" and "named [Ms.] Poon as a joint tenant on the account" because it is inaccurate, misleading, and contrary to the parties' stipulation.

4. Objection. The statement is inadmissible parol evidence. The parties have stipulated that Mr. Fackler and Ms. Poon opened a joint bank account at Meritrust Credit Union on June 15, 2013. Pretrial Order at 5, ¶ 4(c), (d). Ms. Belt contends that Mr. Fackler and Ms. Poon had a separate, unwritten agreement to deposit \$150,000.00 each into the account before it was a joint tenancy account. Pretrial Order at 2, ¶ 4(b), (c). Ms. Belt's statement in Paragraph 4 is inadmissible parol evidence. *See Simon v. Natl Fanners Organization, Inc.*, 250 Kan. 676, 679-680, 829 P.2d 884 (1992) (parol evidence rule generally); *Robertson v. Ladwig*, 244 Kan. 16, 19, 765 P.2d 1124 (1988) (parol evidence inadmissible to vary nature of joint tenancy bank accounts);

Agrelius v. Mohesky, 208 Kan. 790, 494 P.2d 1095 (1972) (same). The court must disregard this inadmissible statement. [K.S.A. 60-256\(e\)](#) (affidavits or declarations supporting motion for summary judgment must be based upon admissible evidence); [Kan. Sup. Ct. Rule 141\(d\)](#) (party may object if facts not admissible into evidence).

Ms. Poon further objects to this statement because it is based upon an affidavit signed by Mr. Fackler on July 23, 2014. Ms. Belt's Memorandum, Ex. A at 3. Ms. Belt offers Mr. Fackler's testimony, as a competent witness, to support her first contention that Ms. Poon breached an alleged oral contract with Mr. Fackler. *See* Ms. Belt's Statement of Facts, ¶¶ 4, 5, citing Ms. Belt's Exhibit A to her Memorandum (Mr. Fackler's July 23, 2014 affidavit). Then, Ms. Belt changes position to claim that Mr. Fackler's mental capacity is so weakened that he cannot make a simple gift. *See* Ms. Belt's Memorandum, Statement of Facts, ¶¶ 13-15, 17, 19, 24, 25, 27, 28, 31, Arguments & Authorities at 14-15. The court should apply judicial estoppel to exclude Ms. Belt's inconsistent positions. "Judicial estoppel precludes a party from taking one position in a case to induce the court to act in a certain way and then taking a contrary or conflicting position in a related proceeding involving the same opposing parties." *Estate of Beldon v. Brown County*, 46 Kan. App. 2d 247, 262-263, 261 P.3d 943 (2011).

The statement is controverted. There is a credibility issue regarding Mr. Fackler's mental capacity to recall events occurring thirteen months earlier to deny Ms. Belt's motion for summary judgment. *See Esquivel v. Waiters*, 286 Kan. 292, Syl. ¶ 2, 183 P.3d 847 (2008) (court may not determine credibility issues in summary judgment motion).

The statement is also controverted by Ms. Poon's testimony regarding this event. *See* Ex. 1 at 47:16-49:14.

5. Objection. The statement is inadmissible parol evidence. *See* Ms. Poon's Response to Paragraph 4, above. The statement is also controverted. *Id.*

6. Uncontroverted. *See* Pretrial Order at 5, ¶ 4(e) (parties stipulated to this fact).

7. Controverted in part. It is uncontroverted that Ms. Poon did not make a deposit into her joint account with Mr. Fackler. However, the funds in the account belonged to Ms. Poon and Mr. Fackler as joint tenants with rights of survivorship upon deposit. *See Simons v. McLain*, 51, Kan. 153, 159-160, 32 Pac. 919 (1893) (joint tenants have "the whole and every part, with the benefit of survivorship"); *Dameron v. Kelsay*, Case No. 96,462 (Kan. App., slip op. filed Sept. 7, 2007), available at 2007 Kan. Unpub. LEXIS 77, *20, attached as Ex. 2 (applying *Simon* stating that "every joint tenant owns an undivided whole of the jointly owned property and the joint tenant does not own a share or a fractional part of the jointly owned property"); *In re Protest of Barker*, Case No. 110,309 (Kan. App. slip op. filed June 6, 2014), available at 2014 Kan. App. LEXIS 37, *12-13, attached as Ex. 3 (citing *Simons* and *Dameron* to confirm that each joint tenant owns the whole and every part of the property).

8. Uncontroverted for the purposes of this motion. [Kan. Sup. Ct. Rule 141\(b\)\(1\)\(B\)](#). Mr. Fackler was hospitalized in October and November 2013. The exact dates of his hospitalization are unknown but immaterial facts.

9. Uncontroverted for the purposes of this motion. [Kan. Sup. Ct. Rule 141\(b\)\(1\)\(B\)](#). It is uncontroverted that Ms. Poon withdrew a portion of the funds in her joint bank account when Mr. Fackler was hospitalized on October 16, 2013. As noted in response to Ms. Belt's Paragraph 8, the precise dates of Mr. Fackler's hospitalization are unknown but immaterial.

10. Controverted. Ms. Poon told Mr. Fackler and Ms. Belt that she would return the \$150,000.00 to the joint account with Mr. Fackler when Ms. Belt returned the \$250,000.00 which Ms. Belt withdrew from the joint account. Ex. 1 at 61:15-21. Ms. Poon did not trust Ms. Belt. *Id.*

11. Objection. Mr. Fackler's recollection, insofar as it varies from the unambiguous terms of the joint tenancy bank account contract, is inadmissible parol evidence. *See* Ms. Poon's Response to Paragraph 4, above. The statement is controverted because Mr. Fackler testified that the account was "our money between her [Ms. Poon] and me and in a special account" and a "deal

between her and me ... nobody else, just her and me.” Ex. 4 at 11:5-9; 6:10-19. The statement is further controverted by Ms. Belt's allegation that Mr. Fackler lacks mental capacity. *See* Ms. Poon's Response to Paragraph 4, above.

12. Controverted in part. Ms. Poon admits that Ms. Belt closed Ms. Poon's and Mr. Fackler's joint account on October 23, 2013. Ms. Belt apparently converted the \$250,000.00 to her own benefit because, in her sworn petition to appoint a guardian and conservator, she makes no mention of these funds as an asset. *See In the Matter of the Guardianship and Conservatorship of Morley [sic] E. Fackler, an adult with an impairment*, Case No. 14-PR-0041 (Sedgwick Co., Kan., Verified Petition filed Jan. 15, 2014) at 2, ¶ 8 (in response to statutory requirement to state the type, location and value of Mr. Fackler's assets, Ms. Belt lists only his home and “Personal Property” with zero annual income), *attached as* Ex. 5.

13. Uncontroverted for the purposes of this motion. [Kan. Sup. Ct. Rule 141\(b\)\(1\)\(B\)](#). The statement is also immaterial.

14. Uncontroverted but irrelevant. There is no contention in this case that that Mr. Fackler lacked mental capacity to enter into the joint tenancy bank account on June 15, 2013. Ms. Belt has questioned Mr. Fackler's mental capacity to make a gift to Ms. Poon on Christmas Eve 2013. As Ms. Belt points out, to make a gift, Mr. Fackler need only sufficient mental capacity to form the intent to make a gift. *See* Ms. Belt's Memorandum at 11, *citing* [Truax v. Southwestern College, Oklahoma City](#), 214 Kan. 873, 522 P.2d 412 (1974), *quoting* *In re Estate of Matthews*, 208 Kan. 492, 505, 493 P.2d 555 (1972). Mr. Fackler does not need to have the capacity to enter into contracts or engage in intricate business transactions. *Perldns*, 210 Kan. 619, Syl. ¶ 4. If Mr. Fackler, on Christmas Eve 2013, had requisite capacity to make a conveyance to Ms. Poon, it does not matter if he was “feeble in mind and decrepit in body.” [Raney](#), 247 Kan. at 368. A person's mental capacity may be established even though he “suffered through senile dementia” where the evidence showed “immediately before and at the time of its execution” he possessed mental capacity. *In re: Estate of Regie*, 170 Kan. 558, 228 P.2d 722 (1951). *See also* *Bennett*, 19 Kan. App. 2d, Syl. ¶ 8 (capacity on the date of execution is relevant). A psychologist's statement of Mr. Fackler's “mental capacity to handle his financial affairs” on November 21, 2013, is largely irrelevant as to Mr. Fackler's capacity to make a simple gift on December 24, 2013. Ms. Poon objects to Ms. Belt's statement as irrelevant. The statement is otherwise uncontroverted.

15. Objection. Ms. Belt's statement is irrelevant for the reasons stated in response to Ms. Belt's Paragraph 14, above. Otherwise, the statement is uncontroverted.

16. Uncontroverted for the purposes of this motion. [Kan. Sup. Ct. Rule 141\(b\)\(1\)\(B\)](#). The statement, however, is immaterial.

17. Objection. Ms. Belt's statement is irrelevant for the reasons stated in response to Ms. Belt's Paragraph 14, above. Otherwise, the statement is uncontroverted.

18. Controverted in part. Ms. Belt asserts that Mr. Fackler and Ms. Poon lied to Ms. Belt about where they intended to go on December 24, 2013. However, in her affidavit, Ms. Belt states that Mr. Fackler and Ms. Poon told her “they were going to run errands.” Ms. Belt Affidavit *attached as* Ex. B to Plaintiff's Memorandum at 3, ¶ 11. A trip to the bank would be a typical errand. Ms. Poon denies that she lied to Ms. Belt. Ms. Poon testified that Mr. Fackler told her to come to his home and pick him up “we got in [sic] errand to do.” Ex. 1 at 64:25-65:15. Ms. Poon testified that she was not aware of Mr. Fackler's intent to give her a gift on that Christmas Eve. *Id.* Furthermore, Ms. Belt testified, contrary to her affidavit, that she knew Mr. Fackler and Ms. Poon were going to the bank. Ex. 6 at 41:10-13. The remainder of the statement is uncontroverted.

19. Controverted.

Sharon Coupland is an Assistant Vice President at the Bank of America. Ex. 7 at 10:16-21. As an employee of the Bank of America, Ms. Coupland is trained in **elder abuse** or financial **abuse** training which must be completed annually. *Id.* at 7:9-9:9. She has been trained to evaluate a customer to determine if she “can have a complete coherent conversation, and if that person seems to be in the right mind.” *Id.* at 8:20-21. More particularly, Ms. Coupland “want[s] to make sure that the person is able to clearly articulate what they want to do, what their intent is, and that they're able to make those decisions.” *Id.* at 8:24-9:3.

“We've had many times where we've seen something happened and it just didn't feel right. It just - you knew something was a little bit off - and then we made the decisions not to do it at that time.” *Id.* at 9:3-9.

Ms. Coupland knows Ms. Poon, Ms. Belt and Mr. Fackler. Ex. 7 at 10:22-11:8. In fact, Mr. Fackler always sought out Ms. Coupland for his banking needs. *Id.* at 11:25-12:4.

Ms. Coupland recalled the December 24, 2013, transaction between Mr. Fackler and Ms. Poon. Ex. 7 at 11:9-15. Ms. Coupland recalled that Mr. Fackler came into the bank with Ms. Poon. *Id.* at 16-20. Mr. Fackler told Ms. Coupland that he wanted a check drawn off his bank account. *Id.* At this point, Ms. Coupland had no concern about Mr. Fackler's mental capacity. *Id.* at 12:19-23. Mr. Fackler seemed normal, “he seemed like Morley.” Mat 12:23-24. Ms. Coupland noted he was his “normal self based upon her interactions with him as a bank customer for five years. *Id.* at 13:1-6. “I was happy to see him because he's been so sick, and he was Morley, so it seemed nice.” *Id.*

Mr. Fackler told Ms. Coupland that he wanted the cashier's check for \$117,000.00 to be issued to Ms. Poon. Ex. 7 at 13:7-9. Ms. Coupland did ask Mr. Fackler “if he was sure since that was a transaction” she had never seen happen before. *Id.* at 13:12-15. “It was not a common thing to see Morley [Fackler] cut a check to anybody, and so when I saw that, I'm like, Morley, are you sure this is something you want to do, it's \$117,000, and he said, yeah.” *Id.* at 13:17-21. Ms. Coupland felt comfortable that Mr. Fackler understood what he wanted to do that that was what he wanted. *Id.* at 13:22:25.

In addition to this transaction, Mr. Fackler told Ms. Coupland that he wanted to terminate Ms. Belt's power of attorney. Ex. 7 at 14:1-14. Ms. Coupland called the bank's legal department, “talk through exactly what the client in front of us is wanting to do, and then they will advise us on the course, the action to take.” *Id.* at 14:15-20. Ms. Coupland testified:

Q. Okay. What happened next after you got legal involved?

A. Morley wanted to remove Carol from the — from the power of attorney. He said he wanted his own control of his own money. I told Morley, listen, you've been sick, you're in the hospital, why not leave Carol on there and in the event of an emergency it makes things a lot simpler, God forbid something would happen. His concern was having anybody have access to his funds. At that time I explained that the funds, every penny, was still in the bank account. That Carol has not whatsoever mis-**abused** any part of the account. And that it might be, at that time, just a good idea to keep Carol on there in the event of an emergency. And that's where I go back to when I say, Morley being Morley, he was very adamant that it was his money and this is what he wanted to do with it, and he didn't want anybody to have access to it.

Q. He made that very clear to you at that time?

A. Right, very clear.

Q. So what happened next?

A. That's when I got my legal department on the phone to go about how do we remove a power of attorney, and that's what we did. And at the same time that's when we cut a cashier's check and we filled it out and he signed it and we issued a cashier's check to Jennie Poon from Morley.

Id. at 14:21-16:1. Ms. Coupland testified that Ms. Poon said little at this meeting - at Mr. Fackler's direction: “Any time she [Ms. Poon] would just talk about nothing - not about this, just talk and just talk, Morley would tell her to be quiet, that he was doing business.” *Id.* at 98:20-99:18. This evidence controverts Ms. Belt's statement that Mr. Fackler “was of unsound mind” and “did not have the requisite mental capacity to make a gift of \$117,000 to Poon.” *See* Ms. Poon's Response to Paragraph 14, above (objection outlining the requisite mental capacity).

20. Uncontroverted.

21. Controverted. Ms. Coupland determined that Mr. Fackler had mental capacity to form the intent to make the gift to Ms. Poon and rescind Ms. Belt's power of attorney. *See* Ms. Poon's Response to Paragraph 19, above. Ms. Coupland testified that, had she been aware of Mr. Fackler's physician's reports (which she was not), she would have contacted her legal department for direction. Ex. 7 at 85:25-86:8.

22. Uncontroverted.

23. Uncontroverted.

24. Controverted in part. Ms. Poon does not dispute that Mr. Fackler has senile dementia and that this condition is progressive. Ms. Poon does dispute that Mr. Fackler lacked the mental capacity to make a gift to her on Christmas Eve 2013. *See* Ms. Poon's Responses to Paragraphs ¶¶ 14, 15, 17, 19.

25. Controverted. *See* Ms. Poon's Response to Paragraph ¶ 19.

26. Controverted in part. Ms. Poon agreed to deposit the funds with her law firm's trust account as part of an agreement with Ms. Belt to allow Ms. Poon to see Mr. Fackler. Mr. Fackler terminated this agreement and Ms. Poon intends to obtain a release of these funds. The statement is otherwise immaterial.

27. Uncontroverted.

28. Uncontroverted.

29. Controverted. Ms. Coupland testified that Ms. Poon spoke with her about having a power of attorney for Mr. Fackler when he went into the hospital in the fall of 2013. Ex. 7 at 48:25-49:18. Ms. Coupland testified that she told Ms. Belt the same thing. *Id.* She stated that "both [were] trying to get power of attorney paperwork on the account." *Id.*

30. Controverted. *See* Ms. Poon's Responses to ¶¶ 3, 7, 11, 14, 15, 17, 19.

31. Controverted. *See* Ms. Poon's Responses to ¶¶ 3, 7, 11, 14, 15, 17, 19.

III. ARGUMENTS & AUTHORITIES.

A. The Meritrust Joint Bank Account.

Ms. Belt contends, in her first claim, that Mr. Fackler and Ms. Poon had an agreement that the Meritrust Credit Union account would not be a joint tenancy account until Ms. Poon deposited an equal sum of money. Pretrial Order at 2, ¶ 4(b), (c); Ex. 6 at 38:15-39:16 (Ms. Belt describing her claim relating to the Meritrust account). This is a claim for a breach of contract upon which Ms. Belt has the burden of proof. *See, e.g., Student Loan Marketing Assoc. v. Mollis*, 34 Kan. App. 2d 541, Syl. ¶ 3, 121 P.3d 462 (2005).

To sustain her burden, Ms. Belt offers a statement by Mr. Fackler in an affidavit he signed on July 23, 2014. *See* Ms. Belt's Statement of Fact ¶ 4, *citing* Ex. A to Ms. Belt's Memorandum (Mr. Fackler's affidavit). This statement is inadmissible parol evidence. *See* Ms. Poon's Motion for Partial Summary Judgment at 4-6, *citing* *Robertson v. Ludwig*, 244 Kan. 16, 19, 765 P.2d 1124 (1988) (evidence offered to vary the terms of an unambiguous joint tenancy bank account inadmissible under the parol evidence rule). *See also* *Agrelius v. Mohesky*, 208 Kan. 790, 494 P.2d 1095 (1972) (same). The court must exclude this evidence.

As stated by Ms. Poon in her motion for partial summary judgment, Ms. Belt's claim, without this evidence, fails as a matter of law. The court should grant partial summary judgment to Ms. Poon on this contention.

Insofar as the court deems the parol evidence admissible, Ms. Poon has shown the court that the evidence is controverted. *See* Ms. Poon's Response to Paragraphs 4, 11, above. Furthermore, Ms. Poon has proffered admissible evidence to satisfy her burden of proof on the affirmative defense of gift. *See* Ms. Poon's Response to Paragraphs 3, 6, 7, 9, 11, above. Mr. Fackler's intent is shown by the unambiguous terms of the joint tenancy bank account contract and his testimony regarding Ms. Poon's intent in opening the account. *Id.* It is undisputed that Mr. Fackler deposited funds into the account by delivering \$400,000.00 for deposit into the account. *Id.*, Paragraphs 3, 6. Ms. Poon accepted the funds by the deposit and her later withdrawal of the funds. *Id.*, Paragraph 9. Ms. Poon has provided evidence to sustain her burden of proof to defeat Ms. Belt's motion for summary judgment. The court must deny Ms. Belt's motion.

B. The Bank of America Cashier's Check.

It is Ms. Belt's contention that Mr. Fackler lacked the requisite mental capacity to convey \$117,000.00 to Ms. Poon on Christmas Eve 2013. Pretrial Order at 3, ¶ 4(g). Ms. Poon, as the proponent of this conveyance, has the initial burden to prove that Mr. Fackler had legal capacity and that the conveyance was duly executed. *In re: Estate of Fan*, 274 Kan. 51, Syl. ¶ 2, 49 P.3d 415 (2002); *Olson v. Harshman*, 233 Kan. 1055, 668 P.2d 147 (1983) (rules governing will contests apply to challenge to *inter vivos* trust conveyance); *Kucaba v. Kucaba*, 146 Neb. 116, 18 N.W. 2d 645 (1945) (same rules apply to challenge conveyance of land); *In re: Adoption of Irons*, 235 Kan. 540, 684 P.2d 332 (1984) (same rules apply to contest adoption). Once Ms. Poon makes & *prima facie* showing of these basic elements, the burden shifts to Ms. Belt to show a lack of capacity by clear, convincing and satisfactory evidence. *Bennett*, 19 Kan. App. 2d at 165.

Ms. Poon has provided evidence to establish & *prima facie* case. There is no dispute that Mr. Fackler, who is 85 years of age, is of the age of majority. *See* Ms. Belt's Memorandum at 1 (stating that Mr. Fackler is 85 years of age). Ms. Poon has provided evidence to show that Mr. Fackler was of sound mind at the time of the conveyance. *See* Ms. Poon's Response to Paragraph 19, above. It is undisputed that the cashier's check was duly executed in that the funds were conveyed to Ms. Poon. *Id.*, Paragraph 26, above. Ms. Poon has met her burden of proof. The burden now shifts to Ms. Belt to prove that Mr. Fackler lacked mental capacity at the time of the Christmas Eve transaction by clear, convincing, and satisfactory proof.

Ms. Poon acknowledges that there is a question of fact as to whether Mr. Fackler possessed the requisite mental capacity at the time of the conveyance. Ms. Coupland, the only independent witness to the transaction, testified that Mr. Fackler possessed mental capacity to convey the funds to Ms. Poon. *See* Ms. Poon's Response to Paragraph 19, above. To challenge this testimony, Ms. Belt has offered opinions from treating physicians raising a question as to Mr. Fackler's mental capacity generally speaking since November 2013. There is a question of fact as to Mr. Fackler's mental capacity that will require trial. For this reason, the court should deny Ms. Belt's motion.

IV. CONCLUSION.

FOR THESE REASONS, the court should deny Ms. Belt's motion for summary judgment.

Respectfully submitted,

TRIPLETT, WOOLF & GARRETSON, LLC

<<signature>>

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